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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 193

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED,

Petitioners,

vs.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEBRASKA,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

ARTHUR F. MULLEN,
WILLIAM B. MCILVAINE,
J. F. DAMMANN, JR.,
Counsel for Petitioners.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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I.

In the brief for the respondent frequent reference is made to the case of *Nichols* v. *Coolidge,* which was recently argued in this court and to the brief filed for the Government in that case. (No. 88, October term, 1926, argued January 6 and 7, 1927.)

In the Coolidge brief (pp. 16, 17, 20) counsel cite, in support of their contention that it is only when the bene-

ficiaries have the use and disposal of the property, without reference to the time of the donor's death, that the gift is not within the statutory language, namely, gifts made to take effect in possession and enjoyment at or after death, the following cases:

Re Waugh Estate, 78 Pa. 436.
In re Einstein, 114 Misc. 452, 186 N. Y. Supp. 931.
In re Bottomley's Estate, 92 N. J. Eq. 202.
In re Fulham's Estate, 96 Vt. 308.
In re Edgerton's Estate, 103 Misc. 471, 170 N. Y. Supp. 222.
Safe Deposit Trust Co. v. *Tait*, 295 Fed. 429.
Stark, Ex'r. Schmidlapp v. *U. S.* 14 Fed. (2d) 616.
McCaughn v. *Girard Trust Co.* 11 Fed. (2d) 520.
Reish v. *Commonwealth*, 106 Pa. St. 521.
Re Jones Estate, 65 Misc. 121, 120 N. Y. Supp. 862.
People v. *Danks*, 289 Ill. 542.
In re Keeney, 194 N. Y. 281.
In re Todd's Estate, 237 Pa. 466.

In all of the above cases, with the exception of *People* v. *Danks, the grantor retained, by some method or other, the income of the property conveyed*, and a transfer tax was sustained in each case for that reason.

The case of *People* v. *Danks*, 289 Ill. 542, involved a gift which was taxed because made in contemplation of death.

The above cases certainly do not support counsels' proposition, that "the settled construction" of the phrase "intended to take effect in possession and enjoyment at or after death" is as they contend.

Coolidge Brief, p. 17.

In support of the proposition that transfers are held to be taxable, although the donor reserves no interest in the property, counsel cite the following cases from Massachusetts and New York:

New England Trust Co. v. *Abbott*, 205 Mass. 279.
State Street Trust Company v. *Treasurer*, 209 Mass. 373.
In re Patterson, 146 App. Div. 286; 130 N. Y. Supp., N. Y. S. 970.
In re Cruger, 54 App. Div. 405.
Matter of Dunlap, 205 App. Div. 128; 199 N. Y. Supp. 147.

These decisions are based upon the inheritance tax statutes of Massachusetts and New York respectively, which differ materially from the estate tax provisions of the Revenue Act of 1918. In both Massachusetts and New York a tax is expressly imposed by the statute upon the transfer of any property when the transfer is made by deed, grant or gift made in contemplation of the death of the donor or intended to take effect in possession or enjoyment at or after his death. They levy succession and legacy taxes, while in Section 401 of the Revenue Act of 1918 the tax is imposed "upon the transfer of the net estate of every decedent dying after the passage of this act." The statutes are so radically different in terms that the decisions in New York and Massachusetts should not control the construction of the Federal statute.

Furthermore in each of the above cases by the terms of the transfers which were taxed it was expressly provided that the property should pass and it did in fact pass *at the death* of the grantor or donor. This fact apparently was of controlling weight in determining the decision of the court.

Counsel also refer to the case of *Vanderbilt* v. *Eidman*,

196 U. S. 482. That case involved the construction of the Federal inheritance tax law of 1898 which was strictly a tax upon successions and was drafted with especial reference to the interests taken by distributees or transferees.

II.

Counsel for the respondent contend that Section 402 of the Federal statute does not define the properties the transfer of which is taxed by Section 401.

They admit that Section 401 taxes only the transfer of property which the decedent owned at the time of his death.

They contend that Section 402 merely furnishes the measure of the tax which is imposed by Section 401.

The necessary and logical result of this contention is that if a decedent dies owning no property which passes at his death, then no tax is imposed by the statute. There is no tax to be measured by Section 402.

The result of this contention is that if a man owning a large estate transfers his entire estate in contemplation of death or after reserving all income until his death, and dies penniless the statute imposes no tax. Nothing passes at his death which is taxed by Section 401.

There is no tax, therefore, to measure and Section 402 has no application. Decedent's estate escapes all taxation.

We submit that the argument of counsel leads to a result which condemns the argument.

If Section 402 is to be construed merely to furnish a measure of the tax imposed by Section 401, then the question remains whether Congress has power to measure a

tax upon the transfer of a decedent's estate at his death by the value of property which did not pass from him at his death.

It is undoubtedly true that the amount of an excise tax may be measured by the value of property which could not be directly taxed.

The property used as a measure, however, must bear some direct relation to the commodity taxed.

In the case of this excise tax the commodity taxed is the right to transfer property at death.

There is no authority for the proposition that a tax upon such a commodity can be measured by the value of property which did not pass at death and therefore bears no relation to the commodity.

In *Maxwell* v. *Bugbee,* 250 U. S. 525, this court, by a divided court, sustained the validity of an excise tax levied by the State of New Jersey which was measured in part by the value of property outside of the state and which the state had no power to tax.

The property the value of which was used in measuring the tax was property of the decedent which passed at his death.

The property used as a measure bore a direct relation to the value of the commodity which was being taxed, that is, the right to transfer property at death.

The amount of a privilege or commodity tax cannot be measured by the value of property which is not directly connected with the privilege or commodity taxed.

In the case of *Flint* v. *Stone-Tracy Company,* 220 U. S. 107, the commodity taxed was the right to do a corporate business, and it was held that the measure of the tax by the gross income of the business was valid as such income directly reflected the value of the commodity taxed.

Property which is in reality the subject matter of the privilege or commodity can be taken into consideration as a measure of the tax upon the commodity, although the property itself may not be directly taxable; but there is no authority for the proposition that property which is not directly connected with the privilege or commodity taxed can be used as a measure of a tax upon the privilege or commodity.

Furthermore, Section 409 of the statute provides that the transferee, trustee or beneficiary shall be personally liable for the tax in the event that the tax is not paid by the decedent's estate. It results that if the tax is imposed and paid by some one other than the decedent's estate, *without reference to whether or not the decedent had at his death any interest in the property which was transferred,* then the tax becomes a direct tax against the owner of the property because of the fact of his ownership. This raises a serious constitutional question. *Llewellyn* v. *Frick,* 268 U. S. 238.

We contend further that the argument of counsel for the respondent leads to the conclusion that under the guise of measuring an excise tax upon a transfer at death by the value of a gift *inter vivos,* the statute in effect imposes a gift tax.

The constitutionality of a gift tax is now before this court for determination.

Blodgett v. *Holden,* Docket Number 779.

Should a construction of the Estate Tax statute be adopted which raises this serious constitutional question?

III.

In the summary of their argument counsel state "the intention of Congress, as well as the letter of the law, requires that there shall be included in a decedent's gross estate the value of all property with respect to which he has made a transfer or created a trust which in substance and effect, though not in form, is testatmentary." (p. 6.)

We find nothing in the letter of the law which requires that there shall be included in a decedent's gross estate the value of property included in a trust which is in substance and effect though not in form testamentary.

The intention of Congress is to be determined by a proper construction of the language used in the act.

It is no answer to the arguments in our brief (that Congress did not intend by the act in question to tax the transfer of property which did not pass from the decedent at his death) to say that it was the intention of Congress to tax testamentary dispositions.

Moreover the essential features of a testamentary disposition of property are two: first, that the act of the grantor is ambulatory, that is, always subject to revocation; and, second, that *no* property or interest in property passes or vests under the disposition *in any one* until the death of the grantor.

Patterson v. *McClenathan,* 296 Ill. 475.
Bullard v. *Suedmeier,* 291 Ill. 400.
Bromly v. *Mitchell,* 155 Mass. 509.
Deifendorf v. *Deifendorf,* 132 N. Y. 100.
1 Page on Wills, paragraphs 35-50-61-68-69.

If by testamentary disposition counsel for respondent means a disposition under which the grantor retains

property until his death, we agree that Congress intended by the act in question to tax the transfer of such interests.

But the transfer involved in this proceeding was not in any way testamentary in character. It was not in substance or effect testamentary.

The transfer by Shukert under his deed of trust was complete and irrevocable at the time it was made. He divested himself of all interest in the trust property and title thereto vested in the grantee.

We contend that the transfer was not taxed by the Revenue Act of 1918.

IV.

Counsel in their brief contend that it was Shukert's express intention that the beneficiaries under the trust should receive nothing until after his death. (pp. 2, 5, 9, 10, 11, 12, 13.) On page 12 of their brief counsel state that the beneficiaries do not dispute the fact that Shukert intended to postpone the possession and enjoyment of the trust property until after his death. In support of their contention counsel have attached to their brief extracts from the evidence. We may assume that they have set forth all the testimony which they regard as pertinent.

The position of the petitioners is that the facts shown in the record do not justify the conclusion that Shukert intended that the date fixed for the termination of the trust should be beyond the date of his death.

The record shows that on or about February 1, 1921, Shukert sold a piece of real estate in Omaha. (R. 43.) He received in payment $35,000 in cash; 10 notes for $5,000 each, payable yearly over a period of ten years, and one note for $140,000, payable February 1, 1951,

thirty years after the date of the note. The property sold was property in which he started in business. (R. 66.) His wife testified that when he decided to sell the building he said:

> "* * * Now we will take this building we worked so hard for and put this away for the children when they get older so that they will surely have something in their old age." (R. 66.)

The cash and notes received for the properties sold constituted the property conveyed by Shukert in trust. The due date of the last maturing note was fixed as the date of the termination of the trust.

Shukert's controlling intent was that the trust should terminate at the date of the maturity of the last maturing purchase-money note. Whether that date would be before or after his death was immaterial. The date was not selected by him because it would probably be after his death. One witness (Harver) so distinctly testified. (R. 47.)

No reference is made in the deed of trust to the death of Shukert. Shukert was fifty-six years of age at the date of the creation of the trust. It was within the range of possibility that he would live beyond the date of its termination. Whether he was alive or dead at the date of the termination of the trust was a matter which did not in any way affect the trust.

It is our contention that the evidence does not establish that it was the controlling intention of Shukert that the trust should terminate after his death. We contend that the date for the termination of the trust was selected by Shukert without reference to the date of his death. It is certain that his death had nothing to do with the possession and enjoyment of the trust property either by himself or by his children.

V.

If the contention of the respondent in this case prevails then a new field of taxation is opened up to the Government. Many trusts are created yearly by grantors for their dependent children in which the trusts may possibly terminate after the death of the grantor.

The Government, relying upon the decision of the Circuit Court of Appeals in this case, is taxing all interests under such trusts which are not certain to vest in possession and enjoyment prior to the death of the grantor in the trust. We submit that the construction placed by the lower court upon the Estate Tax Law in this case was not intended by Congress. The construction contended for should not be adopted by this court.

Respectfully submitted,

ARTHUR F. MULLEN,
WILLIAM B. MCILVAINE,
J. F. DAMMANN, JR.,
Counsel for Petitioners.